

**SUPERIOR COURT OF CALIFORNIA
COUNTY OF SAN DIEGO**

DATE: March 6, 2006 **DEPT:** 69 **REPORTER A:** Not Reported **CSR#**

PRESENT HON.: JEFFREY B. BARTON **REPORTER B:** **CSR#**
JUDGE

CLERK: Deborah Jellison

**REPORTERS' ADDRESS: P.O. BOX 120128
SAN DIEGO, CA 92112-0128**

BAILIFF: None

ORDER AFTER HEARING

GIC 841845 IN RE THE MATTER OF:

SAN DIEGO CITY EMPLOYEES' RETIREMENT
SYSTEM, by and through its Board of Administration,
Plaintiff,

By: Reg Vitek

vs.

SAN DIEGO CITY ATTORNEY MICHAEL J. AGUIRRE,
THE CITY OF SAN DIEGO,
Defendants.

By: Don McGrath

AND CROSS RELATED MATTERS.

On February 15, 2006, the Court heard oral argument on plaintiff San Diego City Employees' Retirement System's ("SDCERS" or "board") Motion for Summary Adjudication to issue one and to the City of San Diego's ("City") Amended Motion to Strike Unions' Complaints in Intervention. The Court took the matter under submission. During the hearing, the Court received, without objection, from the City Attorney's office, a copy of the power point presentation, and set of documents, which included the following:

1. Charter section 40
2. Ordinance 10792
3. Charter section 145, Ch. 61
4. SDMC 22.1801
5. Agreement Legal Retirement System Legal Services, dated April 9, 1997.
6. Bianchi case
7. Ordinance 18600 (0-99-54)
8. Various cases.

On February 16, 2006, the Court confirmed the tentative ruling of February 14, 2006, regarding the Motion to Strike. **The Court vacates the tentative ruling of February 14, 2006, regarding the Motion for Summary Adjudication, and enters the following order:**

MOTION FOR SUMMARY ADJUDICATION

I. Summary of Ruling:

In this section of the Order After Hearing, the Court provides a brief summary of the ruling on the limited issue concerning legal representation of SDCERS in this action. A more detailed ruling follows. This order is limited to the issue of the legal representation of SDCERS before the Court at this time and does not in any way reflect a ruling on the merits of the underlying dispute.

Plaintiff SDCERS' Motion for Summary Adjudication as to issue number one is granted as limited below to the facts of this case for the following primary reasons:

1. The issue of whether SDCERS is an independent entity from the City has been litigated in the past. As a result of this past litigation, the Court of Appeals has determined SDCERS is an independent entity. The Court is bound by this precedent. See discussion of *Bianchi v. City of San Diego*, (1989) 214 Cal. App. 3d 563, in which the City and SDCERS successfully contended SDCERS was a separate entity, below. Further support for the independence of retirement boards in general is found in *Singh v. Board of Retirement*, (1996) 41 Cal. App 4th 1180.
2. In 1992 the voters of the State of California passed proposition 162. This proposition became part of the State Constitution. As a result, the California Constitution gives SDCERS "sole and exclusive fiduciary responsibility over the assets of the public pension system." The purpose of the proposition in the ballot argument was to protect pension systems from political influence. The voters may not have contemplated the nature of the current dispute when the Constitution was modified in 1992. The Court makes no determination whatsoever in this ruling concerning the merits of the dispute between the parties in this case. However, the Court is obligated to follow the law as set forth in the California Constitution, which identifies independent responsibilities and duties for public pension boards.
3. There is a conflict between the legal positions of the City and SDCERS in this action. The City has sued SDCERS in a cross-complaint and seeks a determination that certain benefits are illegal. SDCERS has sued the City and seeks a determination that the same benefits are legal. Each side to this dispute is entitled to both separate and independent legal representation. Due process mandates that each side to a dispute have an independent opportunity to present its case. One side cannot dictate the choice of legal representation to the other. (There are several other pending cases in which a conflict in the legal position exists between the City and SDCERS).
4. An analysis of several additional technical issues is set forth below.

II. Analysis:

Plaintiff SDCERS' Motion for Summary Adjudication to issue one is granted. On the first cause of action for declaratory relief in the complaint, SDCERS is empowered to employ legal counsel of its choosing separate and

independent from the City and the Office of the City Attorney of the City of San Diego. This ruling is restricted to the totality of the facts that currently exist between the parties, including the City Charter, current City Ordinances, the California Constitution, existing case law and the panoply of adverse claims between the parties presented in this case and others. Accordingly, the Office of the City Attorney has no right to fire SDCERS's independent counsel and appoint counsel of its choosing for the very case the City Attorney is prosecuting against SDCERS.

SDCERS seeks a judicial determination by the Court contending that as an independent entity, it has the right under the California Constitution and case law to hire attorneys of its choice. The City opposes this motion contending that under the City Charter, the City Attorney is responsible for advising and representing the pension board.

During oral argument, the City referenced for the first time Ordinance 10792(6), enacted in 1926, which provided that the City Attorney represents the board of administration, and San Diego Municipal Code ("SDMC") section 22.1801, where the City listed the departments of the City, one of which was "City Retirement." Accordingly, the Court strikes the language in the tentative ruling, "The City has cited no authority that the board is merely a department or office of the City. In contrast, the City Charters of Los Angeles and San Francisco directly give authorization for the City Attorney to represent boards. (D's Ex. G, §271; Ex. H, §6.102.)"

Nonetheless, while City Retirement as established in 1926 may be considered a department, under existing law it is a department that may be sued and sue in its own name. Moreover, it has evolved into a retirement board both recognized under, and subject to, state law and the California Constitution. It is the duty of the Court to follow existing law. The Fourth District Court of Appeals, Division One in *Bianchi v. City of San Diego* (1989) 214 Cal.App.3d 563, analyzed the role of SDCERS, and determined that the system is an independent entity from the City for the purposes of res judicata. The parties in *Bianchi* sought a legal determination that SDCERS was separate from the City to avoid the impact of res judicata. Although the City attempts to limit this ruling, the Court noted:

The retirement system is established as an independent entity; all funds for the system are required to be segregated from city funds, placed in a separate trust fund under the exclusive control of the Retirement Board, and may only be used for retirement system purposes. (San Diego City Charter, art. IX, §§ 141, 145.) The Retirement Board acts as an independent administrator empowered to conduct actuarial studies to determine conclusively the amounts of contributions required of the City and participating employees. The board has the sole authority to determine the rights to benefits from the system, and to control the administration of and investments for the fund. (*Ibid.*)

Further support that SDCERS is a separate entity is found in *Singh v. Board of Retirement* (1996) 41 Cal.App.4th 1180, 1185-1186, which reinforced the view that boards should be independent of legislative and executive branch interference, even though Proposition 162's main purpose was to prevent these entities from diverting retirement funds. The Court reasoned, "[C]learly the word 'plenary' was intended to mean that retirement boards would have sole and complete power to administer their systems, as opposed to being subject to direction from state and local legislative and executive bodies in these matters." (*Id.* at 1192; See also, *Bandt v. Board of Retirement, San Diego County Employees Retirement Association* (2006) 38 Cal.Rptr.544, 554-555.)

In 1992, the voters of the State of California passed Proposition 162 and made it part of the California Constitution. The City argues that the intent of the voters under Proposition 162 was to prevent the raiding of public pension funds only. The City further argues since the City Attorney does not have the authority to control the city budget, designating the City Attorney as the chief legal advisor to SDCERS does not contradict the plain language and/or the legislative intent of California Constitution Article XVI, section 17. The City places great emphasis that the City Attorney is an elected official and stresses the legislative intent behind Proposition 162.

The ballot argument in favor of Proposition 162 states, “Do you believe politicians should be able to raid the pension funds of retirees?” (D’s Ex. H, p. 38.) The comment section of California Constitution, Article XVI, 17(g) states as follows:

The People of the State of California hereby find and declare as follows:

- (c) Politicians have undermined the dignity and security of all citizens who depend on pension benefits for their retirement by repeatedly raiding their pension funds.
- (f) To protect pension systems, retirement board trustees must be free from political meddling and intimidation.

The voters may not have contemplated a dispute like the current one when Proposition 162 was enacted and made part of the California Constitution. However, the Court cannot weight the merits or motivations of the litigants. Both the ballot statement and the clear language of the California Constitution stand for the proposition that retirement boards have independent duties and responsibilities. The Court relies on the plain language of the California Constitution, which gives the pension system “sole and exclusive fiduciary responsibility over the assets of the public pension system” and further charges the pension board with “sole and exclusive responsibility to administer the system in a manner that will assure prompt delivery of benefits and related services to the participants and their beneficiaries.” (Calif. Constitution Article 16, section 17(a).) The board has the power to use its assets to retain counsel of its own choosing to assure the prompt delivery of benefits and related services to the participants. The underlying litigation in this case pertains to the legality of those benefits.

During oral argument in support of its position that the City Attorney should represent SDCERS, the City stated that the former City Attorney Witt represented the City and SDCERS in *Bianchi*. However, *Bianchi* was decided in 1989, prior to enactment of Proposition 162. Additionally, the City and SDCERS appear to have been united in their position in that action and there is no evidence SDCERS objected to representation by the City Attorney. Thereafter, subsequent to Proposition 162, as early as 1995, recommendations were made, and later approved for the board to have independent counsel. Since 1997, SDCERS has had independent counsel separate from the City Attorney’s office.

City Charter Article IX, section 144, grants the authority to “appoint such other employees as may be necessary” to the discharge of its duties under the Constitution and Charter. (D’s Ex. F.) On April 9, 1997, SDCERS entered into an agreement with the City Attorney which recognized that SDCERS’ unique position as an independent entity made it necessary to create a separate legal services division containing the position of General Counsel, who would serve at the pleasure of the board. (P’s Ex. G.) The agreement makes note of the potential for a conflict for the office of the City Attorney in the representation of the City and SDCERS on matters involving divergent interests. It states as follows:

“D. This unique fact raises ethical considerations for the City Attorney when the interests of either the City or the board are not in harmony with each other. This can happen in a variety of recurring situations involving funding situations, contribution rates and benefit determinations.

E. In these situations, the City Attorney cannot choose which client to represent. Under the canons of ethics, the City Attorney may not represent either. Two sets of outside counsel are required. This is both expensive and unnecessary.” (P’s Ex. G at page 1).

On April 15, 1997, the Civil Service Commission notified the mayor and city council of its conclusion that positions of SDCERS general counsel and assistant general counsel met the requirements for exemption from classified service under the Charter, Article VIII, section 117.

On May 27, 1997, after the Civil Service Commission had notified the mayor and city council of its conclusions that the positions of SDCERS' general counsel and assistant general counsel met the requirements for exemption from classified service under Charter section 117, the city council enacted Ordinance Number 0-18406, which implemented the positions. (UMF 5 & 6, P's Ex. I.) Since 1997, SDCERS has had independent counsel.

The City enacted Ordinances 0-99-54, and Ordinance No.0-18600, recognizing that the board employs general counsel to provide legal advice. (P's Ex. N.) SDMC §24.0910, which is based on these ordinances, provides that "Unless otherwise provided by Memorandum of Understanding between the City Attorney and the Board of Administration, the City Attorney shall designate one or more Assistant City Attorneys or Deputy City Attorneys to advise and represent the Board of Administration." The 1998 Memorandum of Understanding ("MOU") signed by both the City Attorney and the board, recited that in recognition of the complexity of the legal issues surrounding the SDCERS board's fiduciary responsibilities under Proposition 162, the two professional positions were classified as General Counsel and Assistant General counsel, and were separately classified consistent with the City Service Commission's action. Within the 1998 MOU, the board did not concede that the City Attorney was its legal counsel, but reiterated its position that in its opinion it had the power to hire its own lawyers under Proposition 162, notwithstanding the provisions of Section 40 of the San Diego City Charter. Neither party entered into any admissions by the 1998 MOU. (P's Ex. K, ¶C, D.) The City Attorney has agreed to enter into the 1998 MOU providing that the board will retain its own separate legal counsel for all matters related to the performances of its fiduciary duties, and the board, not the City, has paid its attorneys. (P's Ex. K, ¶2.)

Thereafter, the City Attorney has given notice of the cancellation of this 1998 MOU and contends the City Attorney shall represent the interests of the pension board. During oral argument the City Attorney made assurances concerning the appointment of qualified independent counsel for the pension board. The board's lawyers would be of the choosing of the City Attorney to represent the board in this and other litigation where the interests are in conflict. Under this plan, the lawyer for one party would be choosing the lawyer for the opposing party the lawyer is suing.

Viewed in isolation, under the terms of the 1998 MOU and SDMC Section 24.0910, the City may be correct that the City Attorney would be the attorney for the board when the MOU is rescinded. Left for further analysis is the issue of whether further City Council action would be required to rescind the other implementing ordinances discussed above.

The effect of a determination solely on this basis would mean the City would prosecute this and other actions against the pension board. The City could fire the pension board's lawyers and substitute in other attorneys of the City's choosing. The question becomes whether such a result can occur under the entirety of the law governing the relationship between the City, SDCERS and public attorneys. As discussed above, such a result would appear contrary to the intent of Proposition 162 and the holding of *Bianchi*, supra.

The City again relies on *Westly v. California Public Employees' Retirement System Board of Administration* (2003) 105 Cal.App.4th 1095, 1110, that the authority granted a retirement system under Section 17 is limited to actuarial services and management and distribution of the assets for which the board has a responsibility. As set forth in the August 23, 2005 demurrer ruling, *Westly* is distinguishable because the issue was not whether some other entity was the governing body of the board but whether the board's authority over the administration of the system was in

conflict with the laws governing state civil service and payment of expenses. (*Id.* at 1112.) The Court held the board does not have plenary authority to evade the law that limits the pay of the board and its employees, that specifies the employees exempt from civil service, and that authorizes the Controller to issue warrants and audit their legality. (*Id.* at 1110.) In contrast, SDCERS did comply with the civil service requirements regarding the positions of its attorneys and pay. Furthermore, Section 144, as set forth above, specifically allows the board to hire employees to carry out its plenary responsibilities.

SDCERS relies on *Creighton v. City of Santa Monica* (1984) 160 Cal.App.3d 1011, that if it meets the four element test, as a matter of law, SDCERS is entitled to select its own legal counsel. The Court is not persuaded that *Creighton* is controlling because it was decided four years before *Bianchi, supra*, by the Second District Court of Appeal and prior to enactment of Proposition 162. The City is correct that *Creighton* is distinguishable because the Court emphasized that the Santa Monica Rent Control Board was an elected body as a basis for determining it was independent. In contrast, SDCERS members are appointed generally and actions are approved by its members.

SDCERS argues that “nothing in the Charter, including section 40, can be construed to strip SDCERS of any part of the plenary authority granted by the Constitution to administer the Retirement System.” SDCERS suggests that no municipal ordinance may ever be enacted that would allow the City Attorney to represent SDCERS and cites *Sherwin-Williams Co. v. City of Los Angeles* (1993) 4 Cal.4th 893, 897, that “if otherwise valid local legislation conflicts with state law, it is preempted by such law and is void.” A conflict exists if the local legislation “duplicates, contradicts, or enters an area fully occupied by general law, either expressly or by legislative implication.” (*Ibid.*) The Court declines to extend this ruling that for all purposes and for all time, the board has the right to independent counsel. The Court’s ruling applies to the issues as presented under the current City Charter, the City Council’s ordinances, the California Constitution as applied to the facts of this case and the multiple instances of adverse current litigation pending between the parties. It applies to the current dispute where the City Attorney has represented the City in its’ action against SDCERS and has stated an intent to appoint the attorneys for SDCERS in the very litigation he is prosecuting. It is improper for the Court to give “advisory rulings” of what possible rulings would be on future events or laws not yet occurring or enacted.

This Court may not ignore the fact that since 1997, SDCERS has had its own independent counsel. To insist under these circumstances that the City Attorney’s office represent SDCERS would invite an actual conflict of interest. There are related cases involving retirement issues, including *Gleason v. Gabriel, Roeder, Smith & Company-GIC* 849882, and *McGuigan v. City of San Diego-GIC* 841487. These cases were identified by the City in its Notice of Related Cases filed in this action.

The City’s objection that SDCERS in its reply argued new matters is overruled. SDCERS was responding to the City’s argument that the City Attorney is empowered to concurrently act as counsel for not only the City, but also for SDCERS. The conflict of interest argument has been raised at various levels and is not viewed in isolation. **SDCERS’ objection to the sur-reply is overruled.**

There is a clear conflict in the legal position of the City and SDCERS in this litigation. The City has sued SDCERS in a cross-complaint and seeks a determination that certain benefits are illegal. SDCERS in its suit seeks a determination the benefits are legal. The City Attorney may not represent both entities in this dispute. (See, *Civil Service Commission v. Superior Court*, (1984) 163 Cal. App. 3d 70.) Each side has a need for separate and independent legal representation for a determination of these issues. The ability of a litigant to present its position in court is the hallmark of due process. One side to such a dispute cannot dictate the choice of legal representation to the other.

Accordingly, plaintiff's Motion for Summary Adjudication is granted, but this ruling is restricted to the totality of the facts that currently exist between the parties, including the City Charter, current City Ordinances, the California Constitution, existing case law and the panoply of current adverse claims between the parties presented in this case and others.

Judicial notice is granted, as requested by both parties, except as to the City's request to # 7 and # 8. No court order or document was filed to support the City's contentions on these items.

The City's request for consideration of new evidence is not properly before the Court, as the evidence was filed after this matter was submitted for decision. To review evidence filed after the case was submitted deprives the opponent of the right to oral argument and thus cannot be considered.

Accordingly, SDCERS' Motion for Summary Adjudication is granted as set forth in this ruling.

IT IS SO ORDERED.

DATED: March 6, 2006

JEFFREY B. BARTON
Judge of the Superior Court

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